FILE COPY.

Office Supreme Court
FILED
FEB 27 19
JAMES H. McKE

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

In the Matter of **RACINE KNITTING COMPANY**, Bankrupt.

SECURITY WAREHOUSING COMPANY, W. B. McKEAND, THE L. C. HYDE & BRITTAN BANK OF BELOIT and CITIZENS BANK OF MUKWONAGO,
Appellants,
vs.
ELBERT B. HAND, ANDREW DIETRICH and G. E. McDILL, Trustees of Racine Knitting Company,
Appellees.

No. 229.

BRIEF FOR APPELLEES.

JOHN B. SIMMONS,
Counsel for Appellees.

BURDICK & ALLEN PRINT, MILWAUKEE

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

In the Matter of RACINE KNITTING COMPANY, Bankrupt.

SECURITY WAREHOUSING COMPANY, W. B. McKEAND, THE L. C. HYDE & BRITTAN BANK OF BELOIT and CITIZENS BANK OF MUKWONAGO, *Appellants,* vs. ELBERT B. HAND, ANDREW DIETRICH and G. E. McDILL, Trustees of Racine Knitting Company, *Appellees.*	**No. 229.**

BRIEF FOR APPELLEES.

This case raises the question of validity, as against the bankrupt's trustees, of certain so-called "storage warrants" or "warehouse receipts" issued by the appellant Security Warehousing Company, upon goods of the bankrupt, Racine Knitting Company, stored upon the premises of the latter Company at the city of Racine, Wisconsin, and also at Stevens Point in the same state.

Counsel for appellants seeks to sustain them on the authority of Union Trust Co. vs. Wilson, 198 U. S. 530, and is unable to see any distinguishing features. Counsel, therefore, draws the conclusion that the Circuit Court of Appeals has "adhered to its own views," as expressed in *In re Rodgers*, 125 Fed. 169, in disregard of the decision of this Court; and proffers the remark that such "decision will be of little value to those interested in procuring it, if the lower courts shall misconstrue it merely as a decision upon the particular facts of that case," apparently unmindful of the declaration of this court in that very decision:

> "We deal with the case before us only. No doubt there are other cases in which the exclusive power of the so-called bailee gradually tapers away until we reach those in which the courts have held, as matter of law, that there was no adequate bailment. *Bank vs. Jagode*, 186 Pa. 556; *Drury vs. Moors*, 171 Mass. 252. * * * We may concede for purposes of argument, that all the forms gone through in this case, might be emptied of significance by a different understanding between the parties, which the form was intended to disguise, but no such understanding is stated here, and it cannot be assumed."

True it is, that the "forms" employed in the case at bar (referring now to the contractual forms) were in many respects similar to those in *Union Trust Co. vs. Wilson*. The same is true of *In re Rodgers, supra*. A similar case, recently before this court, in which the defendant *Security Warehousing Company* figured, was *Whitney vs. Wenman*, 198 U. S. 539. In the last mentioned case, the "practice" under this system of warehousing was more like the case at bar than in either of the others, but it went off upon a question of jurisdiction.

When the present case came up on appeal before the Circuit Court of Appeals, *In re Rodgers* was already in the

Supreme Court, and *Union Trust Co. vs. Wilson* was argued at the same term, but slightly in advance of it. Accordingly, the last mentioned case was certified up on a statement of facts, for determination by this Court, and, as counsel has stated, the decision herein was held up awaiting an authoritative settlement, by this Court, of the questions involved. Evidently, the Circuit Court of Appeals regarded the two cases as presenting different phases of the "system" employed, of which the *Rodgers* case presented questions so nearly identical with the case at bar, that the expected decisions would, between them, end the controversy.

The company whose storage warrants were in question in the *Rodgers* case did not, however, embrace the opportunity offered to test their validity upon the merits, and the judgment was reversed on a jurisdictional point. In the case of *Dresser & Co.*, bankrupts, out of which grew *Whitney vs. Wenman, supra,* the same difficulty seems to have been experienced in reaching an adjudication on the merits (see 198 U. S. 539, supra, and 140 Fed. 959), so that when decisions were handed down in these cases, a re-argument was ordered (Rec. p. 270), and it is believed that instead of disregarding the decision of this Court, the Circuit Court of Appeals grounded its decision, now appealed from, squarely upon principles approved by this Court. At any rate, now for the first time is this Court called on to pass upon a state of facts similar to those here presented.

STATEMENT.

The following facts appear by the record and are undisputed:

1. The Security Warehousing Company had no warehouse of its own, and no office or place of business in Wis-

consin. Its nearest office was in the city of Chicago, sixty-three miles from Racine, Wis., and 200 miles from Stevens Point, Wis., where the alleged "warehouses" were set up. (Rec. p. 90.)

2. Its method of doing business was to take leases from its customers, of portions of their own premises, and then issue to them receipts for their own property there stored; and its manager admitted that the purpose of the business was not "storage," but the creation of "collateral storage receipts" (Ibid).

3. By the terms of the agreement, the leased space was to be used for no other purpose, and leases were terminable at the pleasure of the lessor, on return of outstanding receipts. (Rec. 205, 208, 211.) The rent reserved in the leases was nominal, and in fact no rent was paid (Rec. 93), while the rent for the building at Racine, which the bankrupt held by lease at an annual rental of $150, continued to be paid by the bankrupt. (Rec. 93, 155.)

4. The bankrupt assumed all responsibility for repair, suitableness and security of the storage premises, and for loss of or damage to the property stored. (Rec. 211.)

5. No sign of the Security Warehousing Company was shown on the exterior of buildings in which goods were stored. (Rec. 93, 130, 146), and its name was not known in business circles. (Rec. 145.)

6. No goods were stored or intended to be stored but those of the bankrupt.

7. Charges made ostensibly for storage were based not on weight or bulk, or any physical attribute, but at a certain per centage, monthly, on the value of the goods. (Rec. 212.)

8. Both at Racine and at Stevens Point a "custodian" was appointed, such custodian being in each instance the

employe of the bankrupt then having active charge and oversight of its stock, and who continued to act for the bankrupt in that capacity. (Rec. 114, 240, 241.)

9. A nominal salary was agreed on for the custodian, but this and all other expenses, including even the traveling expenses of a representative of the warehouse company in going to Racine, and later to Stevens Point, to start these "warehouses" in operation, were borne by the bankrupt. (Rec. 212, and vouchers Rec. 228-240.)

10. At Racine, the warehousing began in October, 1901, at Stevens Point in January, 1903, and it terminated with the filing of the petition in bankruptcy on October 6, 1903. During that time, the bankrupt paid out over $1,500 for "storing" its own goods, on its own premises, and through the agency of its own employes. No agent of the warehouse company was seen in either place from the time of starting until the failure. Can it be that counsel had these facts in mind when asserting that the exigences of modern business required this device in order to "cheapen the cost of production and distribution?"

At this point it will be necessary to differentiate between Racine and Stevens Point, as the circumstances varied in the two places.

STEVENS POINT.

Here was a warehouse building, in close proximity to the bankrupt's factory, built and occupied by the bankrupt for storage of its yarns and manufactured goods,—a well known part of its plant, all in one inclosure (see plat, Rec. 244). In this building were a door and one small window at the front end nearest the factory, and a similar window at the

rear, and these windows were fitted with iron shutters which were customarily closed.

At one corner of the rear end, the bankrupt built an inclosure of 4-inch slats or palings, having a sliding door and padlock, in which it deposited some yarns, but mainly cases of finished garments. All this before the warehouse company had anything to do with the premises (Rec. 64, 69, 129).

The storehouse was usually locked, there being two keys, one of which hung in the engineer's room near by, and one on a post in the main office (Rec. 65, 66, 131). Neither of these keys ever passed out of the possession or control of the Knitting Company, although, after its insolvency became known, the manager of the warehouse company attempted to gain possession of one, writing Miss Eilers, the custodian, that this had been "overlooked," but was refused (Rec. 66, 138, 245-247).

The method taken to "warehouse" the goods within the slatted inclosure was to attach to the cases small tags (see Exhibit L, Rec. 228), and to place on the *inside* of such inclosure two signs (Rec. 245), one just above the door *facing toward the interior,* and the other on the rear wall. The cases were piled up about seven feet high next the paling and against the opposite wall, leaving a narrow aisle in the center, and the tags were all fastened to the cases on the inner sides, toward this aisle, so that they could not be seen from the outside. Owing to the crowded condition of the room outside the inclosure, the height to which the cases were piled inside, and the position of the signs, neither could such signs be seen from the exterior, even had the room been well lighted. (Pugh, Rec. 136-7; McDill, 145-6; McCreedy, 132).

There was *no sign* on the exterior of the inclosure, and

the only evidence of the company's presence there was its name indented in small letters upon the dark metal of a small padlock, and this was practically invisible except on close inspection and in a strong light. (McDill, Rec. 146; Hand 160; Dietrich 161-2.)

It is significant that the signs were thus placed *on the inside* by direction of Mr. Banks, Chicago manager of the warehouse company, but that after learning the Knitting Company's insolvent condition, he caused one of them to be hastily changed to the *outside* of the inclosure (Eilers 54-5, 61-2; Banks 87; Pugh 137-8), indicating the deliberate omission on his part of steps calculated to give notoriety to the supposed change of possession, and guilty participation in the fraud which this enabled the bankrupt to perpetrate upon its creditors.

The scheme of deception evidence by these acts of designed concealment was furthered by the conditions of light in the room. The windows being usually darkened by shutters, the opening of the door would admit sufficient light to enable one to see that the room was filled with goods; and through the slats of the inclosure could be seen the cases piled nearly to the ceiling; but to read signs or see tags, even if within the range of vision, was impossible. (McCreedy, Rec. 128; Pugh 137; McDill 146-7, 150, 153; Eilers 62.)

The key to the padlock which secured the door to the slatted inclosure was given to Miss Anna Eilers, who was designated as custodian. She was known as "cashier" of the local plant, was second only to the manager in authority, had general charge of all the stock, and superintended the work in the knitting rooms, the filling of orders, and the work of agents in the field. Both before and after her selection as custodian, the handling of stock in the warehouse building was by her personally or under her immediate

direction. She was appointed with full knowledge of these facts on the part of the Security Company, and in fact her selection was approved for that very reason. (Exhibit 17, Rec. 255; Ex. 3, Rec. 240.) Both parties to the arrangement, therefore were guilty (if we may use that term) of choosing for this office, an employee whose acts in the dual capacity would be indistinguishable, and whose playing the role of custodian would, least of any one there give warning or notice of any change of possession.

The key was not kept by her as indicating that she held it adversely (see Drury vs. Moors, 50 N. E. 618), but was carried on a ring with keys to the office, cashier's desk, safe and cash drawer. During the day, the bunch of keys was left about her desk for common use by herself and the manager, and he used them at pleasure. (Rec. 63.) When she absented herself, as she did several times during this period, on one occasion for ten days, she left all of these keys there, and no one in charge of the "warehoused" goods (Rec. 69).

Little proof was obtainable to show actual interference with or substitution of the goods in the inclosure, but it is apparent at a glance that it was at all times *possible* (a circumstance noted in *In re Rodgers, supra*), which is the really important consideration, since the question is one of *notice* and *apparent continued dominion*, and not what was the secret understanding between the parties, nor even the extent to which physical dominion is actually exercised by the original owner. Miss Eilers herself admitted removing some yarn on one occasion for the use of the Knitting Company (Rec. 59). The evidence of Mr. Pugh would indicate that this was not the only occasion (Rec. 139).

And it is significant that although the appellants called Mr. Hayes, the manager, as a witness, he was not asked about his own use of that key (Rec. 164-6).

As the building continued to be openly used by the Knitting Company as before, there was, up to the time Banks caused the sign to be changed as hereinbefore stated, *absolutely nothing* in the appearance of the premises, or the ostensible occupancy and control thereof, to indicate a change of possession. Though quantities of goods could be seen through the slatted inclosure, signs and tags were as invisible as if they had been put *inside the packing cases.*

That the conditions were well calculated to deceive, needs no argument. That one of the principal creditors was deceived thereby the Circuit Court of Appeals was convinced. It is uncontradicted that in June, 1903, when this arrangement was in full operation, H. S. Blake, general manager of the bankrupt, applied to the Citizens National Bank of Stevens Point for an additional loan and an extension of credit, stating positively that none of the company's property at that place was incumbered. (Rec. 147.) Mr. G. E. McDill, cashier of the bank, and a state official, was sent to go over the plant. He saw the boxes of goods inside the paling and was told by Hayes, the local manager, that these were manufactured goods for fall delivery, and that the "object of locking them up was to keep their employees from pilfering."

It is true, as counsel says, that Hayes denied this, but as he also denied any recollection of Mr. McDill's being there after the inclosure was built, his denial is of little weight against the positive testimony to the contrary. Counsel's argument that it was improbable because there were goods outside to satisfy all pilfering propensities, is without force, since only raw materials were kept there. The further statement that the master "refused" to find this fact, is unfounded. The master omitted a number of *uncontroverted*

facts from his report, both he and the District Court deeming, we infer, that there was enough to condemn this practice, without more.

Even if the incident were not true, it might well have been true under existing conditions; and that is the fatal weakness of appellant's position,—the essentially fraudulent and deceitful nature of the business as conducted.

RACINE.

In Racine the bankrupt had no factory, but conducted from its office a "mail order" business, mainly for the sale of hosiery, the product for which came from its factory at Beloit, Wis., some eighty miles west of Racine.

For storage purposes it rented from the Chicago, Milwaukee & St. Paul Railway Company a brick building connected with that company's roundhouse, a few blocks from the office. Of this building it had notorious possession for several years prior to the contracts with the warehousing company, and was the known and recognized tenant, and so continued, paying all rent down to the time of the bankruptcy. (Rec. 115, 141, 155.)

Access to this building was through the adjoining roundhouse (Ex. 13, Rec. 251, 160), and in one corner the railroad company had some property, so that the door was not kept locked. There were two floors both of which were occupied by the bankrupt, and long before the warehousing contract, the bankrupt had constructed slatted inclosures therein, one embracing substantially all of the upper floor, and two occupying corners of the lower floor. These differed from the inclosure at Stevens Point only in that the palings were wider (6-inch boards) and did not reach the ceiling by several feet. (Rec. 114, 155.)

The "lease" to the warehousing company covered the entire upper and lower floors (Ex. E, Rec. 205), but the *public indictations* of occupancy, were identically the same afterward as before. These consisted of the payment of rent, and open transfers of goods, packing cases, etc., to and from this place and the company's office.

In actuality, the bankrupt continued to occupy *exclusively* the space outside the palings, keeping there some manufactured stock, but principally "premium" goods, and packing cases.

No part of the premises was at any time occupied exclusively by the warehousing company.

While the "manifest" goods (those against which receipts were issued) were always put in the inclosures, there were along with them *at all times*, as Amend testified, goods of the bankrupt not covered by manifests, these inclosures being regarded as a protection against pilfering. (Rec. 113, 116, 123.) At one time, the proof shows that Netzinger, shipping clerk, and Cook, a teamster, in the employ of the bankrupt, removed a large quantity of such goods from the open space below to the second floor inclosure, where a considerable part of them remained at the time of the bankruptcy (Rec. 122, 124, 126, 142-3).

As at Stevens Point, the doors to those inclosures were secured by padlocks, the keys of which were given to John Amend, who, to the knowledge of the warehousing company, occupied a position at Racine similar to that of Miss Eilers at the Stevens Point plant. (Rec. 114.) It is clear he did not pretend to hold them adversely to the bankrupt, for, shortly after his appointment as custodian, he was given charge of the Beloit factory, and spent most of his time there, making weekly visits, however, to the Racine office. During his absence he left the key with Netzinger, the bank-

rupt's shipping clerk. (Rec. 109, 116, 120, 121, 141, 143.)

Netzinger has been referred to in appellants' brief as a subcustodian, but in the first place the Security Co. did not appoint him and Amend had no authority to appoint a subcustodian in such a case (Rec. 227), as the Circuit Court of Appeals expressly held (Rec. 281); and beside, we submit the evidence on which counsel bases this assumption, shows upon its face that it was a mere afterthought suggested by counsel. Amend when telling his own story said (Rec. 116):

> "When I was not in Racine, I left the keys with Harry Netzinger. He was shipping clerk of the Knitting Company. After May, 1902, I was in Beloit most of the time, so Netzinger may have put goods in there many times without my knowing it. When I said I didn't know of the Knitting Company having any key, I meant I didn't know of any other key than the ones given me by the Security Warehousing Company."

On re-direct, he was asked (Rec. 118): "How did Netzinger come to have the keys?" and answered: "I took them over to him when I would go away, until my return."

Counsel then put this direct and suggestive question: Q. You appointed him, you selected him custodian while you were gone?" and the witness naturally said, "Yes."

Then, after stating that he told Netzinger not to deliver any "Manifest" goods without his order, he added, *"The balance he had free access to, and left the key for that purpose, that he might go and get them as the mail order department required."* (Rec. 119.) Netzinger is to the same effect, saying Amend told him he would leave the keys *"so I could take care of them in case I wanted to go in there, I would have the keys to get in."* (Rec. 121.)

With reference to the control of the inclosed space and

the goods stored therein, Netzinger testified without contradiction (reducing it to narrative form):

> "In this mail order business we would frequently be short of goods necessary to fill the orders, outside of the manifest stock. It is a fact that I went down there quite often and substituted goods from the office for these goods covered by the manifests. No, that did not occur as often as two or three times a day.
>
> Q. Now, just reflect, didn't you tell Mr. Hand and myself that you went down there two or three times a day? A. That was stock that was released.
>
> We didn't take the goods that often out of the cases for which no delivery orders had been received. In the time I was there, happened three or four times. We did it though whenever we didn't have the goods needed outside of the manifest stock. * * * * * I sometimes went down there with such quantities that I took a teamster, Mr. Cook, along, to make the substitution. These goods were substituted for those inside the fences. It happened the sizes wanted were in those cases down there. These goods were not released from manifest. If released, we would not have had to substitute."

Cook, the teamster, gave corroborating evidence (Rec. 141, 143), and the condition of some of these cases removed before the bankruptcy, as related by Mr. Banks, is significant in this connection. (Rec. 107.)

It should be added that when the petition in bankruptcy was filed, and the receivers appointed, the keys were in Netzinger's possession. (Rec. 124.)

Several large signs were tacked up on the walls inside these inclosures, but it is an error of counsel to say they were identical with those in *Union Trust Co. vs. Wilson.* Exhibit K (Rec. 227) represents these signs, and the Circuit Court of Appeals properly spoke of them as "misleading," since they referred to "bins having signs near man-hole at

top or delivery chute at bottom" as being occupied by the Security Co[illegible]

It is admitted there were no "bins," no "man-holes" and no "delivery chutes" in the building, and one reading these signs could only be mystified and suppose them to refer to some former condition of the premises.

Smaller, inconspicuous signs, about 5x7 inches (like Ex. "O," Rec. 228), were nailed on the outside of each inclosure, but it will be noted that these small signs were like the ones in the *Rodgers* case, and what the Court said of them there is applicable; and as to the tags, it is in evidence that the practice was to assemble a number of cases, perhaps a dozen or more, together, designating them by a "lot" number, and using but a single tag for the lot (Rec. 117). As these could not be read from the outside, and as there was always a quantity of non-manifest goods piled in with the others, it is plain that both these and the signs were worthless as evidentiary of the "actual and continued change of possession" which the law of Wisconsin requires, as against the open, notorious and continued use and control of the premises by the bankrupt.

Finally, we call attention to the fact that W. B. McKeand, one of the appellants, was a director and officer, to-wit, Vice-President of the Racine Knitting Company (Johnson, Rec. 155); and that after the decision of this case in the District Court, and while it was pending in the Circuit Court of Appeals, a settlement was made between himself and the trustees of the bankrupt, concerning certain disputed claims which he had filed against the bankrupt estate, in which settlement he expressly waived and released all claim to the goods for which he held warehouse receipts, and to the proceeds of the same, and the trustees agreed to allow his

claims at a certain sum, which compromise and settlement was duly confirmed by an order of the Referee in Bankruptcy before whom said matter was pending, on the 9th day of July, 1904 (Rec. 266-267). Yet he appears by counsel in this Court prosecuting an appeal from the decision of the Circuit Court of Appeals, and still asserting a right to these goods as against the representatives of the creditors deceived and defrauded by the transactions of the company of which he was one of the principal officers.

As to the Citizens Bank of Mukwonago, another of the appellants, the evidence shows that it had notice, at the time it took the collateral in question, that the so-called warehouse was a part of the bankrupt's own premises (Camp, Rec. 45), and it further appears by the record that after the decision of this case in the District Court, said appellant filed proof of its claim on the promissory note to which the warehouse receipts were collateral, *as an unsecured claim.* (Rec. 263, 265.)

Distinguishing facts as to possession in Wilson case.

The case is clearly distinguished from the *Wilson* case because in that case the only keys to the inclosures were in the possession of the main office of the warehousing company in Chicago, and the bankrupt had no opportunity of access through its employees or otherwise. The goods in that case, furthermore, were in a walled inclosure without openings, not visible to outsiders or prospective creditors, and only accessible through the intervention of the agent of the warehousing company, sent upon request from its main office, who had absolutely no connection as employee or otherwise with the bankrupt; his presence upon the prem-

ises, furnishing at once notice of an adverse interest in the goods stored. Furthermore, in the Wilson case, the signs were easily seen, were large, and conspicuously placed on the outside of the walled inclosure, and not ambiguous or confusing, and the warehousing company had a key to the front door of the bankrupt's store continually in its own possession at its main office. There was no intermingling of goods, no substitution nor opportunity for substitution, no attempted deception by obscure placing of signs on the part of the warehouse company, or by fraudulent representations on the part of the bankrupt, no actual deception of any creditor, prospective or otherwise, no custodians acting as employees of the bankrupt, who in the case at bar were the ones who were naturally engaged in handling and inspecting the goods, and least likely to give notice of a hostile possession or claim of possession.

There is no evidence in the Wilson case that goods were left in the inclosure, visible to the eyes of the world, which belonged to the bankrupt, free from any claim of pledge, as in the case at bar, and which often doubtless comprised the majority of goods within the inclosures at Racine; no evidence in the Wilson case, as in the case at bar, of self accusatory admissions of the warehouse company of the fictitious character of its possession by changing the signs from the inside to the outside on the eve of bankruptcy, and subsequently demanding a key to the outside door of the warehouse, attempting the removal of the goods from the premises, and other means to change its simulative to actual possession.

ARGUMENT.

I.

THE RECEIPTS ISSUED BY THE SECURITY WAREHOUSING COMPANY WERE NOT "WAREHOUSE RECEIPTS" WITHIN THE LEGAL OR COMMERCIAL SIGNIFICATION OF THE TERM, AND THEIR INDORSEMENT IN BLACK AND DELIVERY AS COLLATERAL IN NO WAY AFFECTED THE TITLE TO THE GOODS OF THE BANKRUPT.

It is well settled that in controversies of this sort, involving the validity of transfers of property by warehouse receipts, chattel mortgage, and the like, the law of the state where the property is situated must govern.

In re St. Paul & Kansas City Grain Co., (Minn.) 94 N. W. 218.

Hallgarten vs. Oldham, 135 Mass. 1; 46 Am. R. 433.

Etheridge vs. Sperry, 139 U. S. 276; 277.

Bamberger vs. Schoolfield, 160 U. S. 149.

Hartford Ins. Co. vs. C., M. & St. Paul Ry. Co., 175 U. S. 91.

The case of *Union Trust Co. vs. Wilson* arose in Illinois, and this Court, in discussing the status of the so-called "warehouse" under the law of that state, said:

> "Although the first question does not refer in terms to the statutes of Illinois, it is proper to add that we see no sufficient reason for denying to the place of storage the character of a public warehouse (quoting): 'Public warehouses of Class C shall embrace all other ware-

houses *or places* where property of any kind is stored for a consideration,' R. S. Ch. 114, p. 2. These sweeping words embrace any place so used, whether owned or hired by the warehouseman, and, if so, they embrace as well a place hired of the owner of the goods as one hired of anybody else."

This was one of the points particularly urged by counsel for the warehousing company in that case.

The case at bar, however, arose in Wisconsin, where no similar statute exists, but where on the contrary, not only is a degree of publicity required to the business of warehousemen whose receipts are given recognition, but where the whole policy of the law, as found both upon its statute books and in the reported decisions of its courts, is distinctly opposed to all secret liens upon or sales of personal property.

It is, among other things, provided by statute (R. S. 1898, Sec. 2310), that "Every sale made by a vendor, of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same shall be accompanied by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor * * * and shall be conclusive evidence of fraud," unless the contrary be shown by the person claiming under such sale or assignment.

It is further provided by the following section (R. S. 1898, Sec. 2311), that the term "creditors" as here used "shall be construed to include all persons who shall be creditors of the vendor or assignee at any time whilst such goods and chattels shall remain in his possession or under his control."

Section 2313 of the same statutes declares that "no mortgage of personal property shall be valid against any other person than the parties thereto, unless the possession of the

mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage, or a copy thereof, be filed" in the office of the clerk of the town, city or village where the mortgagor resides or where the property is situated.

And the change of possession required under this section, as the equivalent of or substitute for filing, is the same as that required by Section 2310.

Menzies vs. Dodd, 19 Wis. 343.
Manufacturers' Bank vs. Rugee, 59 Wis. 221.
Schneider vs. Kraby, 97 Wis. 519.

It will be observed that in the case of sales, however, the lack of the statutory change of possession raises only a rebuttable presumption of fraud, while in respect to mortgages, the presumption is conclusive.

If the mortgage be upon a stock of merchandise, and sales be allowed to apply on the debt secured (sales except for that purpose rendering it fraudulent as to creditors, 43 Wis. 116), statements must be filed every sixty days showing the amount of sales and additions and the exact state of the account between mortgagor and mortgagee (R. S. Sec. 2316).

Again, by R. S. 1898, Sec. 2317, it is provided that "no contract for the sale of personal property, by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid, or other conditions of sale are complied with, shall be valid as against any other person than the parties thereto and those having notice thereof, unless such contract shall be in writing, subscribed by the parties thereto, and the same, or a copy thereof, shall be filed," as in the case of a chattel mortgage.

Again, it is provided by Section 2317b Stats. 1898, that "the sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be presumed to be fraudulent and void as against the creditors of the seller," unless such seller shall, five days before the sale, notify personally, or by mail, all of his creditors of the proposed sale.

With reference to warehouse receipts, while the law declares them negotiable and transferable by delivery, with or without endorsement, unless plainly stamped "not negotiable," upon their face, the policy of the state has at all times been to safeguard the interests of the public, and particularly of creditors, by demanding, as the condition of such transferability, certain elements of publicity in connection with the business.

The law itself (Ch. 340, Laws of 1860, amended by Ch. 73, Laws of 1863; now Sec. 4194 R. S. 1898), conferring this quality of negotiability, classed together "warehouse receipts, bills of lading or railroad receipts, given for any goods, wares, merchandise, lumber, etc., stored, shipped or deposited with any warehousemen, wharfinger, vessel, boat or railroad company or other person." Under such expression the inclusion of "warehousemen" along with wharfingers, railroad companies, other public carriers, indicated clearly the public nature of the business which was in the legislative mind, and the addition of "or other person" means simply other persons or corporations of like character. In other words, it is one of those instances where the rule of *noscitur a sociis* applies, as it is uniformly applied by the courts of Wisconsin in the interpretation of statutes.

State ex rel Lederer vs. International Ins. Co., 88 Wis. 512, 519 and cases cited.

And this act has been uniformly so construed in the state where it was enacted. Thus in the early case of *Shepardson vs. Cary*, 29 Wis. 34, which arose soon after the passage of the law, the Court said:

> "To uphold the receipt as a proper warehouse document, transferring the title to the property and operating as a good constructive delivery of it to the vendee, it must in all cases distinctly appear that it was executed by a warehouseman,—one openly engaged in that business,—and in the usual course of trade."

It should be noted that that action was one in equity, to enforce an alleged "equitable lien" in favor of the transferee of the receipt in question, and the court held that equity could afford no relief unless his title were such as to be enforceable in an action at law.

From the rule announced in the Shepardson case, the courts of the state have never departed or relaxed. Indeed it was expressly affirmed and applied in the case of *Geilfuss vs. Corrigan*, 95 Wis. 651, decided as late as 1897.

In that case, a furnace company issued to a mining company storage warrants in the form of regular warehouse receipts, for iron owned by it and stored in its own yards, intending thereby to give the mining company the right and power to raise money on the receipts by sale of the iron or in any manner it saw fit. The mining company used them as collateral to its notes and borrowed money thereon, the Circuit Court finding that both the issuing and negotiation of the receipts were in good faith and free from fraudulent purpose.

> The Supreme Court said: "The so-called storage warrants were not warehouse receipts, either under the laws of Pennsylvania or of Wisconsin. In order to be such, they must be issued by a *warehouseman* (italics are court's) or one openly engaged in the business of stor-

> ing property for others for a compensation," citing 1 Brightly's Purd. Dig. (12th Ed.) 165, Sec. 1; *Bucher vs. Commonwealth*, 103 Pa. 528; and *Shepardson vs. Cary, supra.* And continuing, the Court remarked: "Not only was there no proof in this case that the furnace company was in the warehousing or storage business, but, on the contrary, the proof was conclusive that it was not in such business, and never had been. The fact that it surreptitiously issued the false receipts in question did not constitute it a warehousing corporation. As well might it be argued that the issuance of counterfeit bills constitutes the counterfeiter a bank."

In 1899, the statute we have referred to, giving negotiability to warehouse receipts and bills of lading, was amended by adding thereto the following clause:

> "And any warehouse receipt issued by any person or persons keeping, running and managing a public warehouse, on goods, wares or merchandise owned by him or them, and which he or they have at the time of issuing such warehouse receipt, actually stored in the said warehouse, shall have the same force and effect to protect the owner and holder thereof on any loan or advance of money he may have made on the same, as a warehouse receipt *issued by the keeper and manager of a public warehouse to any other person* who brings goods, wares or merchandise to be stored in such public warehouse."

This statute was the first which permitted the issue of warehouse receipts by an owner upon his own goods, and it will be seen that not only was such right limited to keepers of "public warehouses," but the act plainly shows the legislative understanding that the previous legislation concerning instruments of this character had reference to such warehouses; this interpretation agreeing, too, with the pronouncements of the courts, as hereinbefore indicated.

A later statute (Ch. 251, Laws 1899) extended this right

to dealers in grain, seeds and other products of the farm and dairy, *who own and control the buildings wherein such commodities are stored,* upon their complying with certain conditions designed to give publicity to the transactions, as in the case of chattel mortgages, such as filing a declaration with descriptive particulars in the office of the recorder of deeds, registering all receipts issued in a book open to inspection, and indorsing on the receipts a certificate of full compliance with the act.

It is, then, the settled policy of the law in Wisconsin, to oppose, prevent and invalidate secret liens; to facilitate the transfer and hypothication of personal property as the demands of commerce may require, but to throw around such transactions elements of openness, frankness and publicity which will prevent deception and fraud.

From whatever point of view we regard the instruments here in question, the result is the same. If as warehouse receipts, the law is that they must be issued by a "public warehouseman," one *ejusdem generis* with wharfingers, railroad companies and others mentioned in the act, one "openly engaged in the business of storing goods for hire," or, in the excepted cases, one who "owns and controls the structure" in which the business is carried on, and makes his transactions public. If as chattel mortgages (though that is not claimed here and seems to be debarred by the Geilfuss case) then since it is admitted they were not filed, there is required an "actual and continued" change of possession, and such possession must be "open, notorious, unequivocal and exclusive."

Schneider vs. Kraby, 97 Wis. 519.

While the statute does not in terms apply to pledges, yet since in the case of a chattel mortgage, possession is but a

substitute for registry, while it is the very essence of a pledge, the same principle should and does apply to both.

See Dirigo Tool Co. vs. Woodruff, (N. J.) 7 Atl. 125.
Seymour vs. Colbum, 43 Wis. 67.
Geilfuss vs. Corrigan, 95 Wis. 651.

In the last mentioned case, the Court after holding adversely as to the validity of the documents in question as warehouse receipts, proceeded to discuss their effect as evidence of a pledge. On this point the Court held that to constitute a valid pledge there must be such change of possession that "the property is placed beyond the control of the pledgor." Then, after referring to the facts in the case relating to possession, the Court added: "There can be no constructive or symbolic delivery and *continuance of possession* legally claimed where such a state of facts appears." Again, citing the case of *Casey vs. Cavaroc*, 96 U. S. 467, to the effect that where property alleged to have been pledged remained under the control of the pledgor, with power to substitute, there existed no pledge as against third persons, it is said: "No reason is perceived why this is not wholesome doctrine, nor why it does not apply with equal force to possession by a third person, with power of sale and substitution, as in the present case."

The learned District Judge held in the case at bar that "The obvious purpose of the arrangement was to enable the bankrupt to carry on its business, in the usual course, without the notoriety of chattel mortgages or the interruption of entire removal from its premises;" and further that "the devices must be treated as mere subterfuges; as attempts to evade the statutes of the state both in reference to chattel mortgages and to warehouse receipts or certificates, and that they cannot receive judicial sanction."

Said this Court in the *Wilson* case: "We may concede, for purposes of argument, that all the forms gone through in this case might be emptied of significance by a different understanding between the parties, which the form was intended to disguise. But no such understanding is stated here, and it cannot be assumed." This statement carries with it a clear implication that the suggested case would have a different result. The above finding of the District Judge supplies the element found lacking in the statement of facts submitted in the *Wilson* case.

As Judge Seaman had been long a practitioner at the bar of Wisconsin before going upon the bench and is thoroughly familiar with its judicial policy and administration, we submit that his interpretation of the law of the state is entitled to very great weight, at least in the absence of conflicting authority.

We earnestly contend, however, that, except possibly under a statute like that of Illinois, this system of warehousing is not entitled to and should not receive judicial sanction as a legitimate commercial development, either in Wisconsin or elsewhere; but that it is merely another form or phase of devices which have been resorted to from an early day, to deceive creditors, and which have one after the other been condemned by the courts.

Let us then consider briefly the definitions, and decisions elsewhere, bearing on the subject of warehouse receipts.

Anderson's Law Dictionary defines a warehouseman thus:

> "A person whose business is the receiving and *storing* of merchandise for a compensation. A public warehouseman assumes an obligation *to the entire public.*"

And with reference to receipts it says: "If a receipt is a warehouse receipt it is negotiable, but unless it is in fact such, no form can make it such."

> Bouvier's definition of "warehouseman" is "A person who receives goods and merchandise *to be stored in his warehouse* for hire;" and of "warehouse receipts:" "Receipts given by a warehouseman for chattels placed in his possession *for storage purposes.*"

In *Bucher vs. Commonwealth,* 103 Pa. St. 529, the Supreme Court of Pennsylvania was called upon to decide what constituted a warehouse receipt. A statute of the state defined it as:

> "A receipt given for any goods, wares, grain, produce, etc., stored or deposited with any warehouseman, wharfinger or other person in this state."

Yet it was held that a receipt issued by a person engaged in buying and shipping grain and having a warehouse for that purpose, but who was not accustomed to store grain for others for compensation, for corn stored in such warehouse for a customer free of charge, was not to be regarded in law as a warehouse receipt.

This case, as above noted, and its statement of the law was approved by the Wisconsin Supreme Court in the *Geilfuss* case.

Nash vs. Page, 80 Ky. 539; 44 Am. R. 490, contains an extended discussion of the rights and responsibilities pertaining to the business of warehousemen, and it was held that they owe a duty to the entire public and are bound to serve all alike without discrimination.

The cases are numerous where instruments in the form of warehouse receipts, issued or signed by the owner covering his own goods, or by an employee of the owner acknowling receipt of the latter's goods in store, or by some person or corporation not openly engaged in the business of "warehouseman" have come before the Courts for consideration and have been held ineffectual to transfer the title or create a lien.

Thus, in *Yenni vs. McNamee,* 45 N. Y. 614, receipts for oil stored at the factory, issued to the owner by his superintendent, at such owner's request, and by him delivered as collateral, were held invalid as warehouse receipts, and to be in effect chattel mortgages only, and as such void as to creditors for want of filing.

Farmers and Mech. Nat. Bank vs. Lang, 87 N. Y. 209, turned upon the validity of so-called warehouse receipts issued by a pork packer upon his own property, in store upon his own premises, and they were placed by the Court in the same category with those considered in *Yenni vs. McNamee, supra,* and the same rule was applied.

In *Adams vs. Merchants' Nat. Bank,* 2 Fed. 174, the late Judge Drummond held receipts issued by a private warehouseman on his own goods, void as against his assignee in bankruptcy, although he had in fact taken out a permit for his warehouse, under a statute of Indiana, as a public warehouse in class "B." The learned Judge said:

> "There is nothing to indicate that the bankrupts used their warehouse, as a warehouse under the statute, in any other way than for the purpose specially intended by the bank (i. e., to issue collateral to secure the bank). It does not appear that the property of any other person than that of the bankrupt was stored in the warehouse. The case then was one where the bankrupts * * * stored the property in their warehouse, for which a permit had been obtained, as class "B," and issued receipts for the same and transferred them, through a third person, to whom they were issued, to the bank as collateral security." And the transaction

was held constructively fraudulent as to creditors, and the receipts void as warehouse receipts.

In *Thorn vs. First National Bank,* 37 Ohio State 254, an instrument in the form of a warehouse receipt given by a debtor to his creditor on property of the debtor, who was not

a warehouseman, for the purpose of securing such creditor, was held not to be a warehouse receipt and whether or not to be regarded as a mortgage, it was within the inhibitions and in conflict with the policy of the statute requiring the filing of chattel mortgages, and therefore as to other creditors was simply a nullity.

In *Franklin National Bank vs. Whitehead,* (Ind.) 39 L. R. A. 725; 63 Am. St. Rep. 302, receipts in the form of warehouse receipts were issued by the Greenfield Iron & Nail Company, a manufacturing corporation on its own goods and used for the purpose of obtaining a loan of money. The corporation did not own nor operate any public warehouse, although it had obtained and held a permit from the state as a public warehouseman. Held, that the receipts were invalid as against a receiver of the corporation in winding up proceedings.

> The Court said, among other things: "The effort of said Greenfield Iron & Nail Company to occupy the position of warehouseman was to enable it to borrow money without impairing its credit by giving chattel mortgages or making pledges of its stock. * * * A warehouseman is defined to be the owner of a warehouse; one who, as a business and for hire, keeps and stores the goods of others. * * * It is only persons who pursue the calling of warehousemen—that is, receive and store goods in a warehouse as a business for profit—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it."

Similar cases are *Thurber vs. Oliver,* (C. C., Md.) 26 Fed. 224, in which a receipt of this kind was held invalid as against an assignee under a voluntary assignment for creditors.

> Valley Nat. Bank vs. Frank, 12 Mo. App. 460.
>
> People's Bank vs. Gayley, 92 Pa. St. 518.
>
> State vs. Bryant, 63 Md. 66.

In other cases the question has arisen as to the validity of instruments of one form or another issued by warehousemen for goods deposited in their warehouses, which were not strictly in the form of warehouse receipts, but had been treated as such by the holders and attempts made to transfer the title to or create a lien upon the property described, by transfer of the same.

In *Sinsheimer vs. Whitely,* 111 Cal. 378; 52 Am. St. R. 192, the owner of a warehouse not charging storage, was accustomed to issue weighing tags for goods stored in its warehouse, and gave no other form of receipt therefor. Some of these weighing tags having been deposited by the holder as collateral security, the goods were afterward levied upon by another of his creditors and the attachment was sustained.

The Court held that the corporation issuing the weighing tags was not a warehouseman in the legal sense, and hence could not issue technical warehouse receipts, the transfer of which would constitute a good delivery of the goods represented thereby, and that the transaction created no lien upon the goods in question.

In the following cases receipts signed by the *overseer* of a warehouseman in his own name were held not to be warehouse receipts within the meaning of a statute declaring warehouse receipts negotiable.

People's Bank vs. Gayley, 12 Phil. 183; 92 Pa. St. 518.

Trautman vs. People's Bank, 12 Phil. 276.

Cathcart vs. Snow, (Ia.) 21 N. W. 94.

In *Sexton vs. Graham,* (Ia.) 4 N. W. 1090, a receipt issued by a warehouseman to his creditor, for grain not de-

posited by the latter but belonging to himself, and intended as security for his debt, *held* invalid as a warehouse receipt.

Although the rule prevails in Minnesota that a regular warehouseman may issue receipts to his creditor upon his own grain in store, which will be good as collateral security, it was held that this principle would not be extended so as to give validity to receipts issued by a miller to certain banks to which he was indebted, upon grain in his elevator, although he was accustomed to receive grain in such elevator from farmers and to issue receipts to them for the same.

Fishback vs. Van Duesen, 22 N. W. 244.

In other instances, the device has been resorted to of having receipts issued by an employee or officer of the person or corporation owning the goods, or by some third party, under circumstances such as will render unnecessary the actual removal of the property from the custody of the owner.

Mechanic's Trust Co. vs. Dandridge, (Ky.) 37 S. W. 288.

Bell & Coggeshall Co. vs. Kentucky Glass Works Co., 48 S. W. 440.

Two recent cases in Pennsylvania are deserving of particular attention as they illustrate an earlier phase of the same "system" of pretended warehousing, which is under consideration in the instant case.

Bank vs. Jagode, 186 Pa. 556.

Moors vs. Jagode, 45 Atl. 723.

In the first mentioned case, speaking of the quality of negotiability conferred by the statute on warehouse receipts, the court said: "But in order to have this effect, the re-

quisites of the statute must be complied with, and plainly, the first of these is that *there must be a receipt issued from a bona fide warehouse.*" And it appearing that the so-called warehouse was carried on in the name of one T., an employe of the concern whose goods were stored therein, under the guise of a lease to him, the rent upon which was paid by his employer, it was said further: "On these facts it is perfectly clear, that there was no real warehouse at all in the case, and that T. was a mere man of straw used by the company to cover their own operations with their own goods." And again: "It is not a question of good faith, or even of diligence on plaintiff's part, but of the possession of a good title by means of a valid and genuine receipt. This the plaintiff failed to prove. The paper given to it was not such a receipt, but a fraudulent imitation, and the bank must, unfortunately for it, bear the loss."

In the second cited case, somewhat similar in its facts, the court reaffirmed what is quoted above, and said that the superiority of right "depends on the decisive question whether the wool was in fact 'stored' with a warehouseman, so as to bring the title of the holder within the protection of the act."

Both cases are grounded upon *Bucher vs. Commonwealth,* 103 Pa. 528, cited and approved in the *Geilfuss case,* and it would appear that the strictness of the rule in each of these two states (Wisconsin and Pennsylvania) is due to the quality of absolute negotiability which these receipts possess under their statutes, instead of quasi-negotiability as at common law.

The cases of *Union Trust Co. vs. Trumbull,* (Ill.) 23 N. E. 355, and *In re Rodgers,* already referred to, together with the instant case, are only later developments of the ingenuity of man in devising methods whereby personal property may

be utilized as a basis of financial credit without the publicity and attendant loss of standing consequent upon a resort to chattel mortgages or the open and undisguised hypothecation of the property by way of pledge.

But in truth, there is not a single element of true warehousing about the business as carried on by appellant in stores and factories belonging to its patrons. The most vital principles are lacking, namely, those of "storage" and of "public" service.

In the language of the Wisconsin Supreme Court, a warehouse receipt must be issued by a "warehouseman," and a warehouseman is "one openly engaged in the storage of goods for others, as a business, for profit."

But what have we here? Here is the bankrupt on the one hand, not seeking storage, for that it has in abundance; on the other hand is the so-called warehousing company having no storage and offering none.

What the one seeks, and what the other offers, is "collateral receipts," and nothing else.

The warehouse company assumes no liability whatever to the bankrupt and renders it no service save the issue of these receipts. On the contrary, the bankrupt assumes all liabilities and expenses incident to the business and takes all the risks, the warehouse company being absolved from even the common law liability for negligence attaching thereto.

Where it held the premises under lease, as at Racine, although it sub-leased the whole, it continued to pay the rent, and paid in addition storage charges several times exceeding it.

The security company offered no storage facilities to the public, but stored goods of the bankrupt alone. Is not the transaction, as plain as can be, a mere device and essentially

an issuing by the bankrupt of warehouse receipts upon its own goods? In all essential elements, it is a repetition of *Bank vs. Jagode*, the fiction of a lease to an absentee corporation, and making the employee custodian, being a mere variance in detail, with no change in principle.

One has only to exclude from his thought the *name* of this corporation, calling itself a warehousing company, to perceive the fact very clearly. But a name is nothing, and forms are nothing. The name in this case is a mere sham, a false pretence. As the Supreme Court of Wisconsin said in the *Geilfuss case*, "as well might it be argued that the issue of counterfeit bank bills constitutes the counterfeiter a bank."

The true doctrine applicable to such a case was stated in the *Rodgers case* in these words: "The transaction is not changed by the form of the agreement under which it is cloaked. We are to look to the real purpose of the contract, and not to the form or the name given to it by the parties."

And to what end is this fiction resorted to? We reply again, chiefly if not solely to avoid the publicity and consequent loss of credit, which would result from the giving of a chattel mortgage or the open removal and hypothecation of the property.

A similar scheme was condemned by the Circuit Court of Appeals in the *Rodgers* case, in these words: "We cannot but regard this arrangement as a subterfuge, a mere device to enable the bankrupt to hypothecate the warehouse warrants or receipts, and so to raise money upon secret liens upon property in his possession and under his control." And it was accordingly held fraudulent as to creditors.

It is argued by counsel for appellants that the system in question has grown up out of the necessities of modern

commerce, and the effort to cheapen the cost of production and distribution, and that in the smaller cities goods must be warehoused in this way, if at all.

We answer that with a chattel mortgage law in force, containing provisions for covering additions to stocks of merchandise, and permitting sales therefrom, by merely filing the mortgage in the public registry, with supplemental statements each sixty days, it must have been some other motive than economy which induced the bankrupt in this case to pay out $1,500 in cash for warehouse receipts in the brief time they were issued.

Again, the very fact that small towns do not usually have public storage warehouses, so that creditors dealing with a local merchant or manufacturer do not have their attention directed to and are not led to inquiry on the subject, *aids in the deception which this practice involves and to which it inevitably leads.*

Entering the town silently, occupying no separate structure or premises, displaying no external signs of its presence, neither having nor offering to the community storage facilities, doing business only with the individual whose premises it enters, and even that business secretly, through the medium of his regular employees, appellant's methods are most insidious. Its "system" we consider vicious in the extreme, and not the least so in these less populous places where "warehousing" is not looked for and not suggested by the presence of any known warehouses.

To the contention that the use of signs and tags removes all objection to the business because anyone who sees the goods will thereby have notice of the claims of others, we say, (1) the law requires a complete change of possession, not a mere setting apart or marking of the goods. (2) So

long as the premises are controlled by the owner of the goods, who occupies the same and does business there, with only his own employees about, it depends entirely upon his and their honesty whether such notice is given or not, the removal of signs and tags being an easy matter should his interest prompt it. (3) It is not the actual *seeing* of tangible property which creates credit. Where a large store or manufacturing plant is apparently in the sole possession of a single firm, and is so held out to the public, goods consigned to such occupant and taken upon the premises and retained there, constitute a basis of credit probably more often than personal inspection of the premises. The amount of space occupied and the apparent quantity of property handled, are what men commonly look at. It is somewhat startling to be told that a merchant or manufacturer may thus hold himself out to the world as occupying an entire structure or plant, and at the same time have therein a private "warehouse" wherein he secretly deposits goods thus openly received, paying storage thereon to another although storing them himself, and by that kind of subterfuge obtain receipts, the delivery of which will create valid liens.

In spite of the earnest advocacy of the idea by counsel, we respectfully submit that it is not in the interest of commerce to make easier such "private" encumbering of personal property. Were this true, why not begin at once by repealing all laws relating to the record of chattel mortgages and the like? So long as human nature remains what it is, we conceive that it will be necessary for the courts to rigidly maintain and enforce those wholesome restrictions which the experience of the past has caused to be enacted. In no other way can fraudulent practices and the abuse of credit be kept in check.

II.

THE FACTS SHOWN BY THE RECORD DO NOT ESTABLISH THE EXISTENCE OF VALID LIENS BY WAY OF PLEDGE.

It is contended by counsel that whether or not the instruments in question are valid warehouse receipts, they may still be upheld as constituting valid pledges in favor of the respective holders; and it is claimed that this view is also supported by the decision in *Union Trust Co. vs. Wilson.*

In the first place, it may be said that in respect to a pledge, as distinguished from a mortgage of personal property, *delivery of possession is not a consequence, but the very essence of the contract. Lee vs. Bradlee,* 8 Martin (O. S.) La. 20.

The law relating to pledges is drawn largely from the civil law, and a brief examination of some of the writers upon the civil law, and the decisions of courts which are governed by that law, will tend to throw light upon the subject. Thus, the *Court of Cassation* in France, said on this point: "It is of the essence of the contract of pledge, that the delivery of possession to the creditor shall be an *ostensible fact* of a sufficient notoriety to warn third persons that the debtor is dispossessed of the thing pledged, and that it is no longer a part of his unincumbered property."

Laurent, Vol. 28, Sec. 471, p. 464.

Tropling declares: "We say then two things: it is that the debtor must dispossess himself, and furthermore, *he must dispossess himself ostensibly, frankly, without evasion, and without deceptive combinations which lead third persons into error as to the real possessor of the thing.*" Sec. 298, p. 293.

The Court of Louisiana has stated the same principle in emphatic terms: "The privilege of a pledge is subject to unbending conditions, and there must be an actual delivery in order that those who transact with the pledgor may know that the property is held in pledge. The possession of the pledgee should be real and effective at all times. It must be apparent, and well known. It is essential to complete a real right to movables. This possession should not be equivocal and so placed as to deceive other creditors and lead them to believe that the debtor has always continued the possession." *Banks vs. Janin,* 46 La. Ann. 1001.

Upon this point, the Common Law is in harmony with the Civil Law.

Denis on Contracts of Pledge, at Sec. 134, says: "The fundamental rule of the law of pledge that, for the validity of the contract, there must be a delivery of the thing to the pledgee, and that he must preserve and retain the possession of it as long as the debt is not paid and the contract lasts, that rule belongs equally to the civil and common law, and is of the essence of the pledge under both systems of law."

A recent case in Mississippi well illustrates the necessity for such open and unequivocal change of possession. One McCormick had loaned to the American Cooperage Company the sum of ten thousand dollars and taken as security therefor a pledge of certain cooperage material upon the grounds of the company. To render the pledge valid and effective, the parties agreed that a portion of the land of the company should be leased to him; that some twelve thousand dollars worth of material should be placed thereon, with a distinctive mark on it, and be left in charge of one Hayne as agent of the pledgee. Hayne was instructed that whenever any of the property should be used or removed by the company, he should see that other property of the same kind

and value was substituted for that taken and marked in the same manner. *Held* that the transaction was invalid as a pledge owing to the equivocal character of the possession.

Carpenter vs. McCormick, 22 So. R. 60.

With reference to the suggestion that the locking up of goods in a warehouse or store, and delivering the key of the building, creates a valid pledge of the goods therein, Prof. Dennis while admitting that it has been adopted in decisions both under civil and common law, says (p. 130):

"Yet this doctrine is subject to contestation and some writers say that the principle, if well established in theory, presents difficulty in its application. The possession of the pledgee must be exclusive, whether it is actual or constructive. What, then, if the pledgor has a double key, or a double set of keys, of the store? He is then himself as well in possession of the goods as the pledgee and can dispose of them. If the latter has knowledge of this, or consents to it, the pledge is clearly invalid. Furthermore, the possession of the pledgee and dispossession of the pledgor must be *ostensibly visible* to third parties dealing with the latter. It is not so when the goods are still in the store of the pledgor, though the keys may be in the hands of the creditor. Third persons are not necessarily aware of this fact."

And in *Bank of Martinique vs. Thomas, Lachambre & Co.,* (Journal Du Pless, 1817, p. 145), the French Court of Appeals held with this view, and decided that a pledge of goods was invalid because they had remained in the store of the pledgor, though the keys of the store were delivered to the pledgee, declaring that such a contract was occult; that third persons were not thereby put on their guard in dealing with the pledgor, whilst the law demands that the

dispossession of the debtor shall be ostensible, that is, open, public and unequivocal.

How much less defensible the case, where the building continues in the open, public and notorious possession of the pledgor, and the goods supposed to be pledged are left in charge of the same employees who have always had them in charge, and under equivocal or actually deceptive circumstances.

This point is well put in *Dirigo Tool Co. vs. Woodruff*, (N. J.) 7 Atl. 125, cited by the learned District Judge in this case. A pledge was claimed of certain tools and machinery in a factory. One Beers, the superintendent of the factory was placed in charge for the pledgee. After holding that a pledge requires actual and continued change of possession, the same as a mortgage, the Court said: "But it is said that Beers was there and he had promised to hold possession of the chattels for the pledgee. Beers was, and had been the superintendent of the owner. In exercising control over the operations of the factory, of its machinery and of its products, he was probably the most conspicuous representative of the company. The pledgee left the chattels in the very position calculated to lead any person dealing with them to the belief that the company held towards them the same relation it had always held."

In Wisconsin, beside the *Geilfuss case*, already noted, there is *Seymour vs. Colburn*, 43 Wis. 67, where one C. rented a building in which he stored certain goods, and, having no money, promised the landlord that such goods should remain in the building as security until the rent was paid, but it was held no pledge for want of actual possession.

In a New York case, the cashier of a bank, in order to indemnify one of its creditors, sealed up a package of its bills and left them in its vault, endorsing thereon that the

package was intended as security to such creditor, but it was held that the creditor obtained thereby neither a legal nor equitable lien on the bills contained in the package.

Davenport vs. State Bank of Buffalo, 9 Paige 12.

In Minnesota, the president of a loan association, assisted by the cashier of a bank, selected out certain notes belonging to the bank, placed them in a package by themselves, and deposited such package in an unused drawer in one of the bank safes, under an agreement that they should be held as security for money deposited by the association in the bank. The pledge was held void as against the receiver of the bank, the Court declaring that possession in the pledgee was an inexorable law adopted to prevent fraud and deception; that where the property is capable of personal possession, there must be an actual delivery of the chattels as distinguished from mere pretense; also that the change must be continuing, and not formal but substantial.

Succession of Lanaux, in Louisiana (25 L. R. A. 577), is somewhat similar. In that case the debtor executed his note to a creditor, attaching bonds and stocks to secure its payment, placed the note and securities in a package marked with the creditor's name, and deposited them in a certain bank in a box belonging to himself, instructing his clerk having the key of such box to deliver the same, on request, to the creditor, which direction was communicated by the clerk to the creditor; yet the Court held that there was no privilege created which would give such a creditor a preference as against the heirs or creditors of the debtor after his decease.

Counsel for appellants cites among other cases, *Sumner vs. Hamlet,* 29 Mass. 76, and *Dunn vs. Train,* 125 Fed. 221.

In the former case, certain rolls of cloth in process of manufacture, were selected out by a person employed as finisher, by authority of the manufacturer, and removed to a lower room in the same building occupied by himself for finishing purposes, there to be retained by him as security for a creditor, and the transaction was sustained as a valid pledge. It should be noted, however, that the manufacturer was in that case actually disseized of the property, and it was completely removed from his control. And the finisher, while spoken of as an employee, was in fact a contractor finishing cloth by the piece, and had a contractual right to the undisturbed possession of the finishing room, and it was part of the arrangement that he was to finish the cloth for the pledgee, for which purpose it was necessary to retain it there. These facts seem to furnish the *rationale* of the decision as stated by a standard authority.

Dunn vs. Train was a somewhat similar case, and was decided on the authority of the foregoing. The court should not fail to note, however, that the learned court which decided that case sems to have lost sight of the very elementary principle that possession is the essence of a pledge, and assumed that any act which would be sufficient to pass title as between vendor and vendee would create a pledge, saying: "The general rule is that the delivery must be such as to pass property, and this rule is apparently satisfied by depositing the article pledged or sold in some suitable place for the pledgee or keeper to take away when he chooses, and the delivery may be either actual or constructive."

Whatever may be the law in Maine, that is certainly not law under the statute of Wisconsin, and the point was expressly ruled otherwise in the case of *Menzies vs. Dodd,* 19 Wis. 346, 366; also in *Missinskie vs. McMurdo,* 107 Wis.

578, 583, involving an alleged fraudulent sale; also in *Schneider vs. Kraby,* 97 Wis. 519, 521, relating to a chattel mortgage.

In the last cited case, the courts said:

> "It is well settled that such possession must be actual, open, unequivocal, exclusive and continuous."

The laxness of the rule in Massachusetts at the time *Sumner vs. Hamlet* was decided, is illustrated in *Ward vs. Sumner,* 22 Mass. 59, where mortgaged furniture was formally delivered in the presence of a witness to whom alone the transaction was konwn, but the mortgagor remained in actual possession and use of the furniture as before, and the lien was held valid. This demonstrates there was no statute at that time in force like those of Wisconsin.

It will be instructive to observe the trend of more recent decisions in the same state. Thus, in the case of *Moors vs. Reading,* 167 Mass. 322, a dealer in iron made a bill of sale of his stock to secure a creditor and the latter took formal possession and constituted the bookkeeper of the pledgor, his agent, to retain such possession, and as additional goods were purchased, bills of sale of those were also made to the same creditor, the business, however, being continued as before; it was held that there was no such change of possession as would support the pledge.

In *Citizens Bank vs. Oldham,* 8 N. E. 115, there was an unrecorded mortgage of certain mail wagons, and an agent of the mortgagee, having taken possession, retained the mortgagor to assist in conducting the mail route, and the wagons were continued in service as before. The change of possession was held not sufficient to meet the requirements of the statute (then in force) and an attaching creditor held the property.

Then comes *Drury vs. Moors*, 171 Mass. 252, cited by this court in the *Wilson case*, along with *Bank vs. Jagode*, as a case in which the "exclusive control of the so-called bailee tapers down" to nothingness. This was a pledge of iron stored in a yard of a pledgor under lock and key. The key hung over the desk of the pledgor's bookkeeper, who was constituted agent of the pledgee to keep possession of the property. Notwithstanding the property was clearly identified, and was entirely separate from other property of the pledgor, the yard being some distance from his place of business, it was held that the pledgee acquired no rights as against the assignee in insolvency.

Casey vs. Cavaroc, 96 U. S. 467, a leading case, in which an attempted pledge was held void as against an assignee in bankruptcy of the pledgor, may fitly close this array of authorities. Said this court, and the case is cited not because of resemblance of facts, but for its full recognition of the principles for which we contend:

> "Preference is accorded to a pledgee on the thing pledged, because he has it in his own hands. This possession ought to be certain, and not equivocal. If it is ambiguous, if the things pledged have been so placed as to deceive the other creditors and to lead them to believe that the debtor always continued the possessor, the pledge would be in danger."

Then, after quoting from Dalloz, the court add, referring to that author:

> "He takes special notice of the decision that the pledge is not valid if the dispossession of the debtor *is not sufficiently complete to prevent substitution*, or if there is a mere contract for a pledge, and not an actual pledge."

Some light on this question may be obtained from the decisions under the California Code, which provides with

reference to *sales,* as the Wisconsin Statute does with reference to mortgages, that without actual and continued change of possession a conclusive presumption of fraud arises as to creditors of the vendor. (Civil Code, Sec. 3440.) It was there held in a recent case, that the writing of the vendee's name on a lot of raisin trays and leaving a man at the vendor's house to look after them, did not constitute a compliance with the statute, the court saying:

> "The rule is now firmly established that to constitute such a change of possession of personal property as will make the transfer valid against creditors of the vendor, there *must be such a change of the apparent custody of the property as to indicate to the world that* a change of ownership has taken place."
>
> Byxbee vs. Dewey, 47 Pac. 52.

In Colorado, where a similar law is in force, the rule is thus stated:

> "The vendee must take the actual possession; and the possession must be open, notorious and unequivocal, such as to apprise the community or those who are accustomed to deal with the party, that the goods have changed hands."
>
> Cook vs. Mann, 6 Colo. 21.

In these states and others where a like statute exists, it is held insufficient that the goods are set apart and marked and even put in charge of a servant of the vendor; and that the good faith of the parties is immaterial.

> Vance vs. Boynton, 8 Cal. 554.
> Buting vs. Saltz, 24 Pac. 167.
> Murphy vs. Mulgrew, 36 Pac. 857.
> Joshue Hendy Mach. Co. vs. Connolly, 18 Pac. 327.

Buchinell vs. Weinberger, (Col.) 34 Pac. 911.
Seavey vs. Walker, 108 Ind. 78; 9 N. E. 347.
Stephens vs. Gifford, 137 Pa. 219; 20 At. 542.

In New York, from which state Wisconsin takes its statute, the same rule was applied to mortgaged stoves set apart and marked with tags having the mortgagee's name thereon.

Button vs. Rathbone Sard & Co., 126 N. Y. 187.

In Montana, to barrels of whiskey segregated from the stock and marked with name and a cross.

Story vs. Cordell, 33 Pac. 6.

In Iowa to cattle turned formally over to the mortgagee and placed in charge of a servant of the mortgagor who undertook to keep them for the mortgagee.

Iowa State Bank vs. Taylor, 67 N. E. 677.

In *George vs. Pierce*, (Cal.) 55 Pac. 775, a pledgee of cattle executed a lease of them to the person in charge of the pledgor's ranch, and the lien was held void on the same principle.

Further, a principle drawn from all the decisions is that the possession should in every case be *as complete as the nature of the property admits of.* If capable of manual delivery, that is required. If, however, the property be of such great weight or size as not to be readily moved, constructive delivery, as by going to the place where the property is, pointing it out and marking with some distinctive mark, is generally held sufficient.

22 Ecy. of Law, 855-6.
Jones on Pledges, Sec. 36.
Story on Bailments, Secs. 287-8.

For this reason quite a number of the cases cited by counsel for appellants, which involve possession of heavy or bulky articles, like iron ore, billets of iron and the like, and in which storage in an enclosed yard, designation of the property by the parties, and marking it with conspicuous signs has been held sufficient, are not in point.

In the case at bar the property in dispute was all packed in small cases, which were easily portable, and the property was such as is usually transferred by actual delivery—so that the rules applicable to ponderous property do not apply.

Furthermore, to comply with the law, the possession, as in a case of pledge, must be *exclusive*. Says Sharswood, J., in *McKibbon vs. Martin*, 3 Am. R. 588, 593, "But the law undoubtedly is, that not only must possession be taken, but that possession will not do." There cannot in such case, said Mr. Justice Duncan, be a concurrent possession. It must be exclusive, or it would, by policy of the law, be deemed colorable.

A good illustration of this is found in *Hale vs. Sweet*, 40 N. Y. 97, where the mortgagee of a vessel employed a man to take charge of and run her, but clearances were made in the name of the mortgagor who also collected the freight.

A similar case of an attempted pledge, is *Wickham vs. Levistone*, 11 La. Ann. 702. And supporting the same proposition are:

Jones on Chattel Mortgages, Sec. 185.
Grant vs. Lewis, 14 Wis. 487.
Orsen vs. Sherman, 27 Wis. 501.
Schneider vs. Kraby, 97 Wis. 519.
Pierce vs. Kelley, (Ore.) 34 Pac. 963.
Hale vs. Sweet, 40 N. Y. 97.
Steele vs. Benham, 84 N. Y. 634.

Griffith vs. Douglas, (Me.) 40 Am. R. 402.
Sumner vs. Dalton, 58 N. H. 295.
Atchison vs. Graham, (Col.) 23 Pac. 876.

In *Massey vs. Allen,* 84 U. S. 351, this court had occasion to consider the same question, in connection with a bill of sale of household furniture, both parties to which lived in the same house. The case arose in Missouri, the statute of which declares sales, unlesss accompanied by delivery within a reasonable time, and followed by actual and continued change of possession, fraudulent and void as to creditors of the vendor. It appearing that the parties continued jointly to use the furniture, after as before the sale, the transfer was held void as against the assignee in bankruptcy of the vendor,—the court holding that the change of possession should be open, notorious and unequivocal, and that this excluded the idea of a joint or concurrent possession.

This holding was, naturally, based on the law of the state as interpreted by its courts: As already shown, however, the same rule holds in Wisconsin.

It should further be observed that where doubts exist, they should be resolved in favor of the creditors, or subsequent purchasers, and against the mortgagee.

Anderson vs. Brenneman, 6 N. W. 222.

Innumerable other illustrations might be drawn from the authorities, but these suffice to show that *under statutes such as Wisconsin has,* it is not enough, in respect to goods capable of manual delivery, that some person representing the mortgagee or pledgee be in such relation to them that he can give notice, warning or information of the lien to persons

who may see the goods or attempt to seize them; nor is a joint, mixed, or equivocal possession, or a setting apart and tagging or marking of the goods sufficient, so long as they remain on the premises and under the apparent control of the mortgagor or pledgor.

We will now briefly review the authorities cited by counsel for appellants. *Sumner vs. Hamlet* and *Dunn vs. Train* have already been referred to.

In *First Nat. Bank vs. Penn. Trust Co.*, 124 Fed. 968, a security in the form of a bill of sale was given, covering 200 tons of steel billets which the opinion of the court says, "by reason of their weight and bulk were permitted to remain upon the premises of the vendor," the billets being in separate piles, visible to the public and marked by distinct signs showing them to be the property of the plaintiff bank. In other words, it was simply a case involving the question of what constitutes possession of ponderous property.

Fidelity Co. vs. Roanoke Iron Co., 81 Fed. 439, was not a case of warehousing at all, nor of warehouse receipts, but a case, like the preceding one, of a direct pledge of ponderous property located in an open yard, upon which was placed a conspicuous sign indicating that it was the yard of the pledgee, and there were no circumstances of secrecy, evasion of law, or equivocal possession.

Combs vs. Tuchelt, 24 Minn. 423, is a case of attempted pledge of cigars, and with all due respect to the court, which cites not a single authority in support of its decision, it seems to have made no examination whatever of the law of pledges, and to have not only attempted to apply the rule relating to ponderous property to boxes of cigars, but to have exen extended that rule beyond any known precedent. Compare this case, however, with the late case of *Mahoney vs. Hale* from the same state, cited elsewhere in this brief.

First Nat. Bank vs. Harkness, 42 W. Va. 156. In this case the owner, living in Philadelphia, of a large tank of oil located at Parkersburg, W. Va., gave an order on his agent in charge of said oil, to hold the same for a creditor, as security for his debt, and this was completed by notice to the agent and attornment by him to the creditor. The court referred to the character of the property, cited authorities bearing on the delivery of property incapable of manual transfer, and *held* that these ruled the case.

Love vs. Export Storage Co., 143 Fed. 1, was decided after *Union Trust Co. vs. Wilson,* and simply attempted to apply the principles of that case to the one before the court. Premising that under the decision of this court, any place may be a warehouse and that the sole question in disputed cases is the question of possession, the court discussed the facts bearing on that subject and found that the custodian faithfully guarded the property, week days and Sundays; that there was no interference by the bankrupt, and that the storage company's possession and control were recognized by receivers appointed by the state court; that there were no evidences of bad faith or concealment, and no one was misled; that the signs used were visible to passersby and attracted considerable attention; and finally, that there was no statute of the state which the practice contravened on the contrary, the state court had sustained a similar arrangement. It will be observed that this, too, was a case of ponderous property, consisting of 368 large piles of lumber, and embracing all of the lumber contained in the yard.

The case of *Blydenstein vs. New York Security Co.,* 67 Federal 469, and other cases cited in the same connection, to the effect that an "exchange" of securities is permissible, are heardly relevant to the discussion here. An exchange of

securities implies consent and concurrence of action between the debtor and person secured.

But the question here is one of possession. No agreement for exchange is claimed, but the point is that substitutions by the owner without consulting the supposed pledgee, evidence continued control and dominion by such owner, which are fatal to the claim of pledge.

In this connection we beg to again call attention to the fact that this court in *Casey vs. Cavaroc* adopted language to the effect that "a pledge is not valid if the dispossession of the debtor is not sufficiently complete to *prevent* substitution."

The case of *Millhiser Mfg. Co. vs. Gallego Mills Co.*, 101 Va. 579, was cited in the *Wilson case* only to the point of notice to and assent by the warehouse company regarding a transfer of the receipts; but from counsel's statements of the facts, the issuer of the receipts in question seems to have been a "warehouseman" in the usual acceptation of the term, although not "licensed" according to a state regulation. Had it been a mere milling company issuing receipts for grain in its mill, it would be opposed to *Fishback vs. Van Duser*, (Minn.) 22 N. W. 244; and *Wash. Co. Nat. Bank vs. Motter*, (Md.) 55 Atl. 313, but that does not seem to be the case.

We have read *Gibson vs. Stevens*, 8 How. 383, with care, but we fail to find any issue therein as to the character of the persons issuing the documents in question which consisted of a memorandum of sale with receipt for the purchase money, and an engagement to deliver the merchandise on board canal boats upon the opening of the season of navigation.

Upon these, the vendee in New York endorsed a delivery order addressed to the bailees, of which they were duly noti-

fied and the transaction was sustained, not as one involving warehouse receipts, but as a case where owing to the situation the property was *incapable of actual delivery.*

Montgomery Ward & Co. vs. Am. Trust & Sav. Bk., 71 Ill. App. 20, was a similar case and decided on like grounds.

III.

The question of Equitable Lien.

Failing the contention for the validity of the warehouse receipts, and as well that in favor of a valid pledge, counsel for appellants asserts the existence, nevertheless, of an "equitable lien" which, it is claimed, is superior to the title of the trustee.

Cogent as an appeal to equity ever is, the claim is one which will not stand examination. The only way known to the law whereby a lien can be acquired upon tangible personal property, which will be good as against the rights of general creditors, is by mortgage or pledge.

The claim here made is identically the same which was put forth in *Shepardson vs. Cary,* 29 Wis. 34, and was rejected by the Supreme Court of Wisconsin,—it being held that the holder of the so-called warehouse receipts, failing to establish his legal title could not obtain relief in equity.

There may, it is true, exist as between the parties, by virtue of their contract or course of dealing, an equity, by virtue of which the one *ought to have* a lien as against the other, but, in the language of the writers upon the civil law, there is no "privilege" as against creditors or subsequent purchasers, until the right is consummated,—in the case of a pledge by delivery of possession,—in the case of a mortgage, by either possession or filing in the public registry.

Upon this question, the case of *Casey vs. Cavaroc,* 96 U. S. 467, would seem to be controlling. That case was decided under the Act of 1867, yet this court held that unless the pledgee had perfected his pledge by possession, he could claim no lien as against the assignee in bankruptcy And to the same effect are:

Nisbit vs. Macon Bank and Trust Co., 12 Fed. 686.
Thurber vs. Oliver, 26 Fed. 224.
Adams vs. Merch. Nat. Bank, 2 Fed. 174.
Moors vs. Reading, 167 Mass. 325.
Drury vs. Moors, 171 Mass. 252.
Mahoney vs. Hale, (Minn.) 69 N. W. 334.
Franklin Nat. Bank vs. Whitehead, (Ind.) 63 Am. St. R. 302.

A mere declaration that a thing is pledged is not sufficient without it is accompanied by possession.

Christian vs. Atlantic and N. C. R. Co., 133 U. S. 233.

In *Casey vs. Cavaroc,* Mr. Justice Bradley for this court said:

> "Indeed, it may be laid down as a general rule, as well at the common law as the civil law, that a trustee, assignee, or syndic, having the powers and occupying the relations which are sustained by a receiver under the National Banking Act, or an assignee in bankruptcy, may well oppose any privilege or perference which the law itself, unaided by a bona fide purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference; *even*

though the debtor himself, on account of some personal disability arising from his own cast or engagements, could not resist the claim. That an assignee in bankruptcy has this power cannot well be doubted."

And it was held that the receiver of a national bank had the same right.

Then, to demonstrate the right of the general creditors in such cases, the court proceeded to say:

> "The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods.
>
> This consideration meets the objection which is urged against the rule, that it would result in giving to the general creditors the benefit of the advances made to the debtor on the faith of the stipulated pledge, inasmuch as the estate is increased to the extent of these advances. It is true that the estate is so increased, but the debt and liabilities are increased to the same amount by the demand of the party who makes the advances, the only effect of the rule being, that the latter comes into concurrence with the other creditors, on an equality, and not by way of preference; and if the latter derive any benefit from this result, it must be remembered that, in the view of the law, they might not have given credit to the common debtor had he not remained in possession of the goods, and appeared to continue as the absolute owner thereof. If the pledge should be sustained, they would have good cause to complain that they had been deceived by the acts of the parties setting up the pledge. So that, on the question of relative merit and demerit, the parties are in all respects equal. It is on this principle that the law is founded."

The principle of this and the other cited cases, is that a *mere agreement for a pledge* gives no privilege. To give it effect as an equitable lien is to raise it into a pledge in fact, on the theory that equity regards as done what ought to be

done. But that contention was answered by this court in the case just referred to, in the following language:

> *"Equity will not regard that as done which has not been done, when it would injure third parties who have sustained detriment and acquired rights by the acts that are done."*

In Story on Bailments, Sec. 297, quoted and approved in *Hook vs. Ayers,* (8th Cir.) 80 Fed. 981, it is said:

> "Until the delivery of the thing, the whole rests in an executory contract, however strong may be the engagement to deliver; and the pledgee acquires no right of property in the thing."

And the following cases in addition to those already cited under this title held squarely that the transferee in good faith of instruments purporting to be warehouse receipts, where the requisite possession is lacking, acquires no title or lien whatever as against a receiver, or assignee in insolvency, or trustee in bankruptcy, as the case may be.

> Mechs. Trust Co. vs. Dandridge, (Ky.) 37 S. W. 288.
>
> Bell & Coggeshall Co. vs. Kentucky Glass Works, (Ky.) 48 S. W. 440.
>
> Moors vs. Jagode, (Pa.) 45 Atl. 723.
>
> Whitney vs. Wenham, 140 Fed. 959.

As the Circuit Court of Appeals said in this case: "Delivery of possession is the very life of a pledge. No mere *agreements respecting possession* can create it. The contract of pledge cannot exist outside of the *fact* of a change of possession."

The case chiefly relied on in support of appellants' posi-

tion, is *Union Trust Co. vs. Trumbull,* 137 Ill. 146, in which the Supreme Court of Illinois, after first declaring void the warehouse receipts there in question, and holding them of no effect, on re-hearing recognized them as conferring an equitable lien, good as against an assignee for creditors under the state law, and that upon the very ground held inapplicable to cases of this sort in *Casey vs. Cavaroc.*

The case is clearly out of harmony with the well settled law of pledges, as well as with the cases of *Shepardson vs. Cary* and *Casey vs. Cavaroc,* cited above. In so far as it conflicts with these latter cases, it must, of course, be disregarded as the one represents the law of Wisconsin, which this court will give effect unless contrary to the rules by which it is governed, and the other represents the deliberate, final judgment of the court itself.

Let us briefly consider the other cases cited by counsel for appellants upon this proposition of an equitable lien. We are first told that equitable liens are recognized in Wisconsin, and to this *McDonald vs. Daskam* is cited (116 Fed. 276), which we may say is presumptively not in conflict with the instant case, since both were decided in the first instance by Judge Seaman, and affirmed by the court from which this appeal comes, after both courts had their attention called to it specifically.

The case involved an assignment of *insurance policies* and the court simply held that it was not a case of pledge, to which delivery was essential, but an equitable assignment of a chose in action or personal contract, and as such created a valid lien upon the proceeds of the policies. It was a completed transaction, a lien perfected, and not a case in which the aid of equity was sought to declare done that which was merely intended to be, or ought to be done.

And this was in accordance with a recent ruling by the Supreme Court of the state.

Rommerdahl vs. Jackson, 102 Wis. 444.

Walker vs. Brown, 165 U. S. 654, was an action in equity and involved only the rights of the *immediate parties* to the agreement.

Hauselt vs. Harrison, 105 U. S. 406, was a case of an agreement, construed to be a mortgage, covering certain skins bought for the purpose of tanning and of which possession was acquired before bankruptcy; and *Yeatman vs. Savings Institution,* 95 U. S. 764, was a case of a valid, subsisting pledge; while *Stewart vs. Platt,* 101 U. S. 731, involved a chattel mortgage, taken and filed in good faith, but, as it was held by a divided court, not filed in the proper office. None were cases of merely equitable liens.

Hewitt vs. Berlin Mach. Works, 194 U. S. 296, involved the question of the validity of a conditional sale contract, which by the statute of New York is not void as to creditors, but only, "as to purchasers and mortgagees in good faith." The court said: "A lien which is good against the bankrupt and *as to all his creditors,* is good against the trustee."

In re Garcevich, 115 Fed. 87, involved the same question, the language of the court is authority only so far as it was essential to the decision. As a matter of fact, the contract was held fraudulent since its terms contemplated a right of sale in the vendee and reserved title only to the goods not sold. Being fraudulent, the court held it was void as to the trustee, saying: "It is not the meaning of the present act that the institution of proceedings in bankruptcy should secure immunity to the title of fraudulent vendors or

mortgagors, and deprive creditors of a resort to property out of which, but for the proceeding, they could have satisfied their claims.

Section 70-a declares in express terms that the title of the bankrupt shall vest in the trustee to all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

"This language is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another."

To cite *In re Standard Laundry Co.*, 116 Fed. 476, upon this proposition, must be a mistake. In that case the bankrupt had bought property, and *assumed to pay* a mortgage thereon. The mortgage was claimed to be void as to creditors. But whose creditors? Not his, but his vendor's. As against him, it represented a part of the price, and was as good as if he had borrowed the money on mortgage and paid it over.

In re Chase, 124 Fed. 753, was a case of a voluntary assignment, followed by bankrupt proceedings, and the court, following *Randolph vs. Scruggs*, 190 U. S. 533, held that the assignee had a lien *on the property in his possession* for expenditures beneficial to the estate.

In re Josephson, 116 Fed. 404, was a chattel mortgage case in which, following the law of Georgia, the court held the mortgage good not only *inter partes*, but also as to creditors unless fraudulently kept from record.

It is respectfully submitted that none of these cases are relevant to the question of "an equitable lien" upon tangible personal property, based upon a pretended possession which did not exist.

If further direct authority be required to the point that

such liens have no recognition as against a trustee in bankruptcy, or other like representative of creditors, we cite *Davenport vs. Bank*, 9 Paige 12, a case somewhat similar to *Casey vs. Cavaroc*, where it was expressly held, that the pledge failing for insufficiency of possession, no equitable lien existed as against a receiver of the pledgor bank.

In re Rond (D. C. Ind.), 111 Fed. 154, held that a chattel mortgage given by the bankrupt within four months preceding the adjudication, to secure a loan made prior to that period was not rendered valid by a promise to give such security made at the time the money was loaned. The court after stating that to allow such a secret equity would defeat the beneficial effects of the recording statute, said:

> "It cannot be successfully maintained that the verbal agreement created a valid lien as against the claims of creditors; and if it did not create a valid lien, then by the terms of the bankruptcy act (Sec. 67a), it cannot be enforced as a lien entitled to priority over other claims. It created no lien—nothing but a secret equity—good perhaps between the parties, but not enforcible to the prejudice of creditors."

Long vs. Farmers State Bank, (8 C. C. A. 1906), 17 Am. B. R. 103, is somewhat similar. A merchant obtained a loan of money from bank contracting to insure his stock to a certain amount and assign the policies as security. A fire occurred before the policies had been assigned, and the money having been paid over to the bank within the four months' period, the court held that there was no valid lien prior to such payment and the trustee was entitled to the money.

The reasoning by which this claim of an equitable lien is supported, is that under the authority of recent decisions of this court, the trustee takes over the property of the bank-

rupt subject to all liens and equities with which it was impressed in the hands of the bankrupt himself, and that this includes an equitable lien such as is here asserted.

It had been considered by a majority, we believe, of the lower and intermediate federal courts, that there was a difference between the powers and rights of a trustee under the present act, and those conferred by the Act of 1867, but we accept as authoritive the recent declarations of the court that there is no material change in this respect, and proceed to discuss the question from that standpoint.

We say first, that all but the last two cases herein cited, arose and were decided under the Act of 1867 and uniformly they deny the right to such lien.

Next, we claim that the Circuit Court of Appeals was clearly right in its interpretation of the ruling of this court in *Hewitt vs. Berlin Mach. Works*, and *Thompson vs. Fairbanks*, namely, that they simply held a lien which was good as against the bankrupt and *all of his creditors* was good against the trustee; and we do not understand that this ruling has been changed by any later decisions. In the earlier of the two cases the court was careful to state that its conclusion in the case before it, was not affected by "a different result arising in states by whose laws conditional sales are void as against creditors."

The trustee, therefore, does not take the title *in all respects* the same as the bankrupt held it. In what respect then, is his standing different from the bankrupt?

The provisions of the present bankruptcy law which we deem material to the question are the following:

> Sec. 67 "a. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

"b. Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

"d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.

Sec. 70 "a. The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all. * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The language of Sec. 67a was no doubt chosen advisedly.

The so-called "equitable lien" for which counsel contend, is not a lien in fact; it is a mere "claim" or right to have a lien which failed "for want of record or for other reasons." It comes clearly within the language of the Act and consequently is not a lien against the bankrupt estate.

In re Ronk, supra, 111 Fed. 154.

Clearly, also, as was well and concisely stated by the Circuit Court of Appeals in its opinion herein (Rec. 285), the liens which are saved by Sec. 67 (d) are *liens in fact*, not promises to give liens, or equitable claims that what ought to have been done shall be considered as done, but claims perfected, actually consummated, in such manner as the law requires.

Two of the "reasons" why the warehouse receipts do not constitute valid liens against the bankrupt estate, have already been fully covered, namely, (1) the fact that they are not warehouse receipts, under the laws of Wisconsin; (2) that they are not valid pledges for want of an actual, open, notorious, unequivocal, exclusive and continuing change of possession.

The present contention of counsel admits these propositions to be true, and seeks to avoid them on grounds of equity.

But there is still a third reason why the receipts are not valid liens, and that is because the transactions, being a mere subterfuge and device for evading the laws of the state, and violative of its policy concerning secret liens, were fraudulent as to creditors.

This has been found by both the District Court and the Circuit Court of Appeals, and supplied the element said by this court to be lacking in *Union Trust Co. vs. Wilson.* It must be admitted there is ample evidence to support the finding, and this court will not therefore review it.

Hunt vs. Illinois Cent. R. Co., 184 U. S. 77.
Stuart vs. Hayden, 169 U. S. 1.
Brainard vs. Buck, 184 U. S. 99.
Smith vs. Burnett, 173 U. S. 430.

The fraud is of the same character as that which results from withholding a chattel mortgage from record, to avoid injury to the mortgagor's credit; which the Supreme Court of the state has repeatedly declared sufficient to invalidate the mortgage.

Standard Paper Co. vs. Guenther, 67 Wis. 101.
Sanger vs. Guenther, 73 Wis. 354.
Valley Lumber Co. vs. Hogan, 85 Wis. 366.

And in *Sanger vs. Guenther*, it was said that this result followed irrespective of any actual intent to defraud. In the language of the court:

> "If permitted to assert the validity of the mortgage as against those who have given credit under such circumstances, it amounts to a legal fraud whether there was any actual intent to defraud or not. This would be the inevitable effect of such secret arrangements between mortgagor and mortgagee."

Under the state law of Wisconsin, as interpreted by the courts, an assignee in insolvency has powers substantially the same as those of an assignee in bankruptcy under the Act of 1867.

Batten vs. Smith, 62 Wis. 92, 98.

And it is held that he and he alone can sue to set aside a mortgage as fraudulent on this ground, even when it is void only as to those creditors who became such before the mortgage was filed.

Valley Lumber Co. vs. Hogan, 85 Wis. 366.

In re Andrae & Co., (D. C. Wis.) 117 Fed. 563, was a case relating to a mortgage of this character, and it was held void both as to an assignee appointed under the state law and a subsequently elected trustee in bankruptcy. The court said "no amount of good faith can rescue it from the condemnation of the statute."

In re Shaw, (D. C. Md., July, 1906), 17 Am. B. R. 196, was also a case of this kind, but there a pretense had been made of delivering the property (which consisted of tanbark in piles), by scaling the piles, attaching wooden blocks thereto, marked with letters of the alphabet, and formally delivering to an agent of the mortgagor. The court held

that *although the mortgagor might be estopped himself* from contesting the possession, the mortgage was not enforcible against the trustee. We emphasize the ruling on estoppel, since that is one of the grounds urged by appellants.

This court has also pronounced such a mortgage fraudulent as to creditors, and so, voidable by an assignee in bankruptcy.

Blennerhassett vs. Sherman, 105 U. S. 100.

Another class of cases of deceptive appearances with which the law deals in the same way, is that of chattel mortgages of stocks of merchandise where the mortgagor, either by express or implied consent of the mortgagee, is permitted to sell in the usual course of trade, applying the proceeds or part thereof to his own use.

Blakeslee vs. Rossman, 43 Wis. 665.
Anderson vs. Patterson, 64 Wis. 557.
C. Baumbach Co. vs. Hobkirk, 104 Wis. 488.
Bank vs. Joannes, 98 Wis. 321.
Durr vs. Wildish, 108 Wis. 401.

In Anderson vs. Patterson, the court said:

> "Such a mortgage apparently places the property beyond the reach of creditors and drives them to a contest with the fraudulent mortgagee, if they seek to enforce payment out of the property thus encumbered. * * * That the inevitable tendency of a mortgage fair and valid upon its face, but void because of some extrinsic or secret infirmity, must be to hinder and delay creditors in the collection of their debts, is perfectly obvious."

In another case, it is said:

> "It is not a question of intent. The fraud which the law implies is conclusive, and no amount of good intent will suffice to remove the taint."

Such a mortgage is invalid as against the assignee of the mortgagor under the state insolvent law, and the latter may recover the property, even though the mortgagee may have taken possession before the assignment.

Durr vs. Wildish, 108 Wis. 401.

The case of *Robinson vs. Elliott, 22* Wall. 513, places this court in line with the state court as to the fraudulent character of this class of mortgages, and under a statute like that of Wisconsin they were declared void as against the mortgagor's assignee in bankruptcy.

We may well apply to the circumstances of the present case, the words of this court in the case just cited:

> "In truth the mortgage, if so it may be called, is but an expression of confidence, for there can be no real security where there is no certain lien."

In that case also the mortgagee had taken possession before the bankruptcy, and it was sought to sustain the lien by way of pledge, but the court disposed of that claim by saying:

> "If appellants could turn it into a voluntary pledge, it would not help them, for it would violate the preference clause of the Act, as they got the goods only twelve days before petition filed."

We have already discussed at length the features of the warehousing business as disclosed by the evidence in this case, which bring it clearly, as we believe, within the rule of these cited cases, and render the receipts at least constructively fraudulent as to creditors, and we need not enlarge upon them here.

But again, if the warehouse receipts were invalid and created no pledge, then the goods in controversy could without any question have been levied upon and sold by judicial

process against the bankrupt. This was expressly ruled in the *Geilfuss case* already referred to. Such is the effect also of the decision in *In re Garcevich,* supra, as shown by quotation from the opinion. Many other cases cited in this brief, wherein the ruling has been adverse to the validity of the alleged lien, are to the same effect. This will appear from the statement of the facts made in connection with the citations and we, therefore, omit repetition of the titles.

Here, however, counsel for appellants contends that this view nullifies the words "title of the bankrupt" in the same section,—asserting that these words restrict the trustee absolutely to the position and rights of the bankrupt. But counsel's view ignores the provisions of Sec. 67a, already discussed, declaring in plain words that attempted liens invalid as to creditors "for want of record or other reasons" shall not be liens against the estate in his hands.

Mortgages, which "for want of record" are invalid as to creditors, are yet perfectly good between the parties, and if the trustee takes only such title as the bankrupt has, and in exactly the condition he holds it, then he would take it subject to unrecorded mortgages void as to creditors, which is a direct contradiction of Sec. 67a. If, on the other hand, the trustee takes title free from *unrecorded mortgage liens* which are void as to creditors, so, by the same Section, he must take free from "claims" to the property which are invalid "for other reasons."

By the many authorities herein cited, it has already been seen that this class embraces the claims of holders of warehouse receipts in form, which are in fact lacking in some essential of such instrument, or are mere imitations, subterfuges or fraudulent devices; also to pledges invalid for want of possession; to other claims defective because of mixed or

equivocal possession, of which *Massey vs. Allen*, 84 U. S. 351, is an example; to claims for equitable liens growing out of the foregoing or other circumstances, which have failed of consummation; and to all claims based upon instruments either actually or constructively fraudulent as to creditors.

As to the latter class, they are excepted in every statement of the rule as to the trustees' title, even in the cases cited by counsel for appellants; and in *Casey vs. Cavaroc*, it is distinctly stated that "bad faith" would defeat a pledge although the pledgor had possession, that want of possession is equally fatal, though the parties may have acted in good faith, and that both are necessary to constitute a good pledge so as to raise a privilege against a representative of creditors, in that case, a bank receiver.

Yet again, Sec. 70a (4) provides that the trustee takes the "title of the bankrupt" to property conveyed by him in fraud of creditors. But he must take something more than the title as the bankrupt held it, or the provision would be meaningless. For, as counsel admits, the bankrupt has no title to property fraudulently conveyed, *provided* it be an absolute conveyance.

Counsel seeks to escape this dilemma by saying that if the conveyance is not absolute, the bankrupt still has the title subject to the encumbrance," leaving us to infer that such title is what, in his view, the trustee would take.

But to our minds, such construction comes hardly short of being absurd. In the first place, if that were the meaning the provision would be unnecessary and useless, because the bankrupt's equity would be subject to sale on execution, and so, would pass under Sec. 70e (5). And again, the whole tenor and policy of the bankrupt law forbids the idea that the trustee takes merely the equity *subject* to the fraudulent

conveyance. And still again, it is not to be supposed that the Congress intended the trustee should take title when the fraudulent conveyance was partial or conditional only, but to deny that right if the fraud extended to the conveyance of the whole.

Finally, counsel turns to clause (e) of Section 70, claiming the right to recover because the trustee in that clause is given the right to avoid "any transfer" by the bankrupt of his property which any creditor might have avoided, and recover the property from "whoever may have received it," except a bona fide holder.

We reply (1) the question under discussion being the right to a mere equitable lien, the rule of *bona fide* purchaser does not apply. He only is a *bona fide* purchaser in the law who secures the legal title, not one who obtains an equity only.

Hawley vs. Diller, 178 U. S. 476.
Clark vs. Herrington, 186 U. S. 206.

And even if equities were considered, the equities of creditors in this case would outweigh those of the claimants under this deceptive system of warehousing. Even Judge Clark in the unpublished opinion to which counsel refers, stated that "In the absence of such transfer of possession as would constitute a pledge, *the position of innocent holder could not exist.*"

(2) The trustees in this case are not seeking to *avoid any transfer of title.* There is no instrument in the case purporting to transfer any property. A chattel mortgage transfers title, but a pledge is made effective by "possession only," the title remaining in the pledgor. The *Geilfuss* case brings

out this point in saying that the invalid warehouse receipts are not chattel mortgages in legal effect; and the distinction is one which is now well settled.

Jones on Chat. Mortgs., Sec. 4.
Casey vs. Cavaroc, 96 U. S. 467, 478.

Instead of the trustees seeking to set aside a transfer, the appellants, under the present contention, stand here admitting the invalidity of the so-called warehouse receipts,—admitting the invalidity of the alleged pledge,—and seeking to enforce a secret, equitable lien against property in the possession of the trustees. In other words they are asking the court to create for them a valid security which was never consummated between the parties.

The trustees having sold the property which came lawfully into their possession, simply stand here denying the right of appellants to be given, after bankruptcy, a security they did not before possess.

(3) As to two of the appellants, there could not, in any event, be successfully asserted the claim to be innocent purchasers. On this, we beg to refer to the statement of facts.

We most respectfully submit that the judgment appealed from should be affirmed.

JOHN B. SIMMONS,
Solicitor for Appellees.